Before the

# Federal Communications Commission

Washington, D.C. 20554

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| **In the Matter of** | ) | |
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| **Modernization of Media Regulation Initiative** | ) | **MB Docket No. 17-105** |
| | ) | |
| **Revisions to Cable Television Rate Regulations** | ) | **MB Docket No. 02-144** |
| | ) | |
| **Implementation of Sections of the Cable** | ) | **MM Docket 92-266** |
| **Television Consumer Protection and Competition** | ) | **MM Docket No. 93-215** |
| **Act of 1992: Rate Regulation** | ) | |
| | ) | |
| **Adoption of Uniform Accounting System for the** | ) | **CS Docket No. 94-28** |
| **Provision of Regulated Cable Service** | ) | |
| | ) | |
| **Cable Pricing Flexibility** | ) | **CS Docket No. 96-157** |

## COMMENTS OF NCTA—THE INTERNET & TELEVISION ASSOCIATION


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February 8, 2019

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## SUMMARY

The *Further Notice* proposes to update the Commission's rules implementing Section 623 of the Communications Act. Those rules govern the regulation of basic service and equipment rates in markets where the operator does not face "effective competition." NCTA applauds the Commission for initiating this proceeding to update cable rate regulation in a sensible fashion as part of its wide-ranging and forward looking "modernization" initiative.

The Commission's decision to propose specific reforms to its rate regulation rules in this proceeding is the right one. For those rare instances in which cable systems remain subject to local rate regulation, as well as in any future instances that might arise where a cable system is regulated for the first time (or is re-regulated after a period of deregulation), the Commission's complex and administratively burdensome rules, forms, and procedures remain mired in the past and are increasingly unworkable.

We therefore support the Commission's proposals to modernize and streamline its cable rate rules to reflect the current video marketplace and minimize unnecessary regulatory bureaucracy. However, the Commission should not relinquish the central role assigned to it by Congress in setting the ground rules for local regulation. Indeed, without firm Commission guidance, the local rate regulation process could become more burdensome and less predictable. The Commission must continue to establish and oversee specific rules that local franchising authorities are required to follow.

NCTA supports adoption of an "Updated Comparative Benchmark" ("UCB") methodology – a new and simplified framework for regulating cable rates that would reduce the need for complicated and burdensome rules and forms. The UCB would ensure that regulated basic service rates are reasonable by comparing the regulated rates to an objective sampling of the basic tier rates charged by the same operator in communities where effective competition is

present. Thus, the UCB would satisfy Congress' mandate that the Commission's rate regulation rules take into account the rates charged by cable systems that are subject to effective competition and minimize the administrative burdens imposed by such regulation.

The UCB methodology should be available to systems currently subject to rate regulation, as well as to newly regulated and re-regulated systems, and should be available for use in setting equipment rates as well as the basic tier rate. Moreover, the Commission should avoid imposing burdensome evidentiary requirements on cable operators that justify their rates based on the UCB. Doing so would, in fact, be counterproductive and contrary to the goals of this proceeding.

The UCB represents the best approach to resolving the fundamental deficiencies in the current rate regulatory regime. If the UCB rate is equal to or greater than the regulated rate proposed by the cable operator, that rate would be presumed to be reasonable – unless the franchising authority can demonstrate that the cable operator either incorrectly calculated the UCB or that the UCB was based on a materially distorted sample of unregulated systems. Appeals to the Commission of franchising authority decisions rejecting a cable operator's UCB-based rate justification would automatically stay the franchising authority's decision, subject to refunds plus interest if the Commission ultimately affirms that decision.

As an alternative to the UCB methodology, cable operators should have the option of justifying their current basic service and equipment rates and future rate increases using simplified versions of the existing Form 1240 and Form 1205 that do not require a cable operator to look backwards to justify its current rates. The Commission also should update the scope of equipment rate regulation rules by clarifying that such regulation is limited to the rates paid by basic-only subscribers (whether or not that same equipment is available for lease at unregulated

rates by other subscribers). Taking these actions would allow the Commission to eliminate the many arcane and often obsolete rate-related rules that consume an inordinate portion of Part 76 of the Code of Federal Regulations and provide no tangible benefit to the public.

Finally, the Commission should adopt its tentative conclusion that commercial services are not subject to rate regulation. As NCTA has previously demonstrated, limiting rate regulation to residential rates is the correct result, as a matter of both statutory interpretation and regulatory policy.

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## COMMENTS OF NCTA—THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA")[1/] submits its comments in the above-captioned *Further Notice of Proposed Rulemaking* ("*Further Notice*").[2/]

## INTRODUCTION

The *Further Notice,* which is part of the Commission's wide-ranging and forward-looking "modernization initiative" to identify and eliminate "outdated, unnecessary or unduly burdensome" regulations,[3/] proposes to update the Commission's rules implementing

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1/ NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving 80 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing more than $250 billion over the last two decades to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 30 million customers.

2/ *Modernization of Media Regulation Initiative: Revisions to Cable Television Rate Regulations*, Further Notice of Proposed Rulemaking and Report and Order, MB Docket No. 17-105, et al., FCC 18-148 (rel. Oct. 23, 2018) ("*Further Notice*").

3/ *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406 (2017) ("*Modernization Initiative Public Notice*").

Section 623 of the Communications Act. Those rules govern the regulation of basic service and equipment rates in markets where the operator does not face "effective competition."[4/] As the *Further Notice* recognizes, video competition has been utterly transformed in the quarter century since Congress enacted the 1992 Cable Act.[5/] Thus, this proceeding is squarely in line with the express objectives of the modernization initiative.

The *Further Notice* is not the first step taken by the Commission to address rate regulation and the new competitive reality facing cable operators. In 2015, the Commission adopted a rebuttable presumption that cable operators are subject to effective competition – leaving the basic service and equipment rates of only a relative handful of cable systems regulated by local franchising authorities ("LFAs").[6/]

The Commission's decision to update the effective competition presumption was welcome and appropriate.[7/] And the Commission's decision to propose specific reforms to its rate regulation rules in this proceeding is the right one. For those rare instances in which cable systems remain subject to local rate regulation, as well as in any future instances that might arise where a cable system is regulated for the first time (or is re-regulated after a period of deregulation), the Commission's complex and administratively difficult rules, forms, and procedures remain mired in the past and are increasingly unworkable. We therefore support the Commission's proposals to modernize and streamline its cable rate rules to reflect the current video marketplace and minimize unnecessary regulatory burdens.

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4/ 47 C.F.R. § 76.905(a).

5/ *Further Notice* ¶ 2.

6/ *Amendment of the Commission's Rules Concerning Effective Competition: Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015).

7/ NCTA supports Charter's pending petition to deregulate additional communities based on AT&T's DirecTV Now service. *See* Charter Communications, Inc., Petition for Determination of Effective Competition, MB Docket No. 18-283, CSR 8965-E (filed Sept. 14, 2018).

Although the Commission clearly should simplify cable rate regulation, it should not relinquish the central role assigned to it by Congress in setting the ground rules for local regulation. Indeed, without firm Commission guidance, the local rate regulation process could become more burdensome and less predictable. The Commission must continue to establish and oversee specific rules that LFAs are required to follow.[8/]

NCTA supports adoption of a simplified framework for regulating cable rates – one that replaces most of the Commission's current rate rules and forms with an easily applied "Updated Comparative Benchmark" ("UCB") based on the rates currently charged by systems in competitive markets. Adopting this approach in place of the existing regulatory regime would further Congress's mandate that cable rate regulation "take into account . . . the rates for cable systems that are subject to effective competition" while at the same time reducing the administrative burdens imposed by such regulation.[9/]

The UCB methodology should be available to systems currently subject to rate regulation as well as to newly regulated and re-regulated systems. Regulated cable operators also should have the option of justifying their current basic service and equipment rates and future rate increases using simplified versions of the existing Forms 1240 and 1205. By taking these steps, the Commission can eliminate the many arcane and often obsolete rate-related rules that consume an inordinate portion of Part 76 of the Code of Federal Regulations and provide no tangible benefit to the public.[10/]

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8/ *See* 47 U.S.C. § 543(b)(2).

9/ *See id.* § 543(b)(2)(A) & (C).

10/ The Commission's rate rules are codified in Subpart N of Part 76 of Title 47 of the Code of Federal Regulations. That subpart occupies nearly 60 pages – almost one-third of all of Part 76. Form 1240, which is just one of many existing rate regulation forms promulgated by the Commission, is 15 pages long with another 29 pages of instructions. Many of these pages relate to cable programming services tier rate regulation, which Congress sunset almost 20 years ago.

## DISCUSSION

### I. The Commission Must Continue To Play a Central Role in Establishing Rate Rules and Adjudicating Rate Disputes Under the Existing Statutory Mandate.

In seeking comment on whether to adopt fundamental changes to the existing cable rate regulation framework, the *Further Notice* asks if the Commission should simply "eliminat[e] all of our existing rate regulation forms and direct those few LFAs that remain engaged in rate regulation to set reasonable BST rates based on the factors listed in Section 623(b)(2)(C)?"[11/] We urge the Commission *not* to pursue this approach, which would be contrary to congressional directives. Congress expressly instructed the Commission to "prescribe, and periodically thereafter revise, regulations …. to ensure that the rates for the basic service tier are reasonable"[12/] and to establish "standards, guidelines, and procedures concerning the implementation and enforcement of such regulations."[13/] Congress further instructed the Commission, in carrying out these obligations, to prescribe "procedures for the expeditious resolution of disputes between cable operators and [LFAs] concerning the administration of [the Commission's rate] regulations"[14/] and to "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[15/]

Given Congress's express statutory delegation of governing authority to the Commission, it would be neither lawful nor practical for the Commission to relinquish its primary role in establishing, and overseeing the application of, that regime.[16/] Moreover, some of the ideas

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11/ *Further Notice* ¶ 11 (citations omitted).

12/ 47 U.S.C. § 543(b)(1).

13/ *Id.* § (b)(5).

14/ *Id.* § (b)(5)(B).

15/ *Id*. § (b)(2)(A). The Commission expressly acknowledged these statutory obligations in its initial "Rate Order" implementing the 1992 Cable Act's rate regulation provisions. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631 ¶ 3 (1993) (Congress intended for "substantive and procedural rules to govern regulation of basic rates … to be adopted by the Commission, which is also to serve as an appellate body to review local rate decisions.").

16/ *See Further Notice.* ¶¶ 11–12.

raised in the *Further Notice*, such as relying on a case-by-case approach, or permitting each LFA to come up with its own cost-based review of basic tier rates, would inevitably lead to inconsistent and irrational rate requirements and decisions that vary from community to community.[17/] The resulting confusion and uncertainty would add to, rather than reduce, the regulatory costs and burdens faced by cable operators and regulators alike.

Relying on a patchwork of LFA-based rulings, rather than a uniform Commission-based methodology, also would complicate the fulfillment of Congress's desire for the "expeditious resolution" of rate regulation-related disputes between cable operators and franchising authorities.[18/] In contrast, the existing "rate appeal" process, under which the Commission reviews conflicting interpretations of its own rate formulas and rules, has worked well to minimize the frequency with which such conflicts arise.[19/] Uniformity and certainty in the application of local rate regulation remain critical to carrying out Congress's desire for an orderly rate regulation regime that balances the interests of consumers, LFAs, and cable operators.

## II. The Commission Should Adopt an Updated Comparative Benchmark Methodology for Basic Service Tier Regulation.

The continued need for Commission-established rules and oversight is clear where rate regulation applies – but it is equally clear that the current regime is in serious need of reform. Although cable systems compete head-to-head with a variety of multichannel video programming distributors and other providers of video programming, only cable operators are potentially subject to time consuming and expensive reviews of basic tier rates at the local level. This regulatory process has become unnecessarily cumbersome. As Chairman Pai pointed out in

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17/ *Id*. ¶ 12.

18/ 47 U.S.C. § 543(b)(5)(B).

19/ As the *Further Notice* recounts, franchising authorities in just two states continue to regulate rates and "the Commission has not received any local rate appeals in the past year, and has received only four local rate appeals in the past ten years." *Further Notice* ¶ 6

his separate statement accompanying the *Further Notice*, the Code of Federal Regulation contains many pages of outdated rate rules.[20/] These rules (and related forms) are relics of a complex and detailed regulatory regime that the Commission created for a much different time in the cable industry's history.[21/] Fortunately, the Commission can substantially simplify its current regulatory regime while still complying with its statutory obligations under Section 623.

### A. An Updated Comparative Benchmark Methodology Would Ensure Reasonable Rates While Significantly Simplifying the Rate Setting Process.

In a letter filed with the Commission last July, NCTA described the streamlined UCB proposal, explaining that it would ensure that the basic tier rate charged by a regulated cable operator in a particular jurisdiction meets the statutory standard of reasonableness[22/] by comparing that rate to a reasonable, objective sampling of the basic tier rates charged by the same operator in other communities it serves that are subject to effective competition.[23/] Adoption of the UCB would enable a multiple system operator ("MSO"), if it chooses, to justify its rates without having to prepare and file complicated rate regulation forms. It also would facilitate the ability of an MSO to charge the same basic rate across a region or even the entire country, and thereby simplify its marketing materials, create efficiencies in its customer service operations, and reduce customer confusion. Federal, state and local regulators also would benefit from the reduction in the administrative burdens and costs associated with the current complex, formula-driven, and paperwork-heavy rate methodology.

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20/ *Further Notice*, Separate Statement of Chairman Pai. *See also* note 10 *supra*.

21/ *Further Notice* ¶ 10 ("Our existing framework, which consists of many pages of regulations and numerous complex rate calculation forms, was implemented when the vast majority of cable operators were subject to rate regulation.").

22/ 47 U.S.C. § 543(b)(1) ("The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.").

23/ Letter from Diane Burstein, NCTA, to Marlene Dortch, Secretary, FCC, MB Docket No. 02-144 (July 3, 2018).

Determining whether a cable system's basic tier rate is reasonable using the UCB methodology would be significantly simpler than calculating a system's "maximum permitted rate" ("MPR") using the FCC's existing rules and formulas, which require a cable operator to work through a complicated set of calculations. In the case of a newly regulated system, the operator is expected to dig back as far as 1992 for the information needed to "build" the current MPR. Even systems that have been continuously regulated must report both historical and projected information in order to calculate their current MPR.

Given system ownership changes and changes in channel line-ups over time, the complications of determining compliance with a rate regulation approach that rests on prices charged for the basic tier more than 25 years ago no longer serves the public interest. It would be far simpler to permit operators in the handful of communities not subject to effective competition to establish basic tier rates based on the current rates charged by the vastly greater number of systems that are subject to effective competition. This simplified approach would necessarily produce a real world result that fulfills the Commission's original objective in establishing benchmark cable rate regulation.

The proposed UCB approach is entirely consistent with Section 623. In focusing on the rates charged in areas that are today facing "effective competition," the UCB mirrors the statutory command found in Section 623(b) to adopt regulations "[d]esigned to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[24/] The UCB is similar in concept to the "competitive differential" that was the foundation of the existing rate methodology when it

[24/] 47 U.S.C. § 543(b)(1). *See also* H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 62 (1992) (expressing Congress's intent "to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.").

was adopted in 1993.[25/] But now that effective competition has taken hold in almost every community nationwide, it is far simpler and more sensible to look to the rates ***currently*** charged in those competitive, unregulated markets to determine the reasonableness of a regulated cable operator's basic rate.[26/] The goal of the Commission's original benchmark rate regulation, after all, was to replicate rates established in competitive markets.[27/] Maintaining a complex regulatory regime to achieve that result when a much simpler comparison is available would be at odds with sound public policy.

### B. The Commission Should Not Impose Detailed Evidentiary Burdens or Adopt Other Proposals That Would Complicate the UCB Methodology.

In the *Further Notice*, the Commission asks what modifications, if any, should be made to NCTA's proposed UCB methodology and whether the Commission should impose detailed evidentiary burdens on those operators that rely on the UCB methodology. For example, noting that not all of a company's systems may have the same basic tier channel line-up, the Commission asks whether the sampling should include only systems with "comparable" program offerings.[28/] Requiring the sampled systems to have a high degree of overlap in their channel line-ups, however, is unnecessary to ensure that the UCB is representative of a competitively set

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[25/] The "competitive differential" represented the Commission's estimate in 1992 of the extent to which the relatively limited number of cable operators that then were subject to effective competition charged less than other cable operators who were not subject to effective competition at that time. *See Revisions to Cable Television Rate Regulations*, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 ¶ 42 (2002) ("*2002 Rate Revisions NPRM"*).

[26/] *See id.*

[27/] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, First Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 1164 ¶¶ 11-13 (1993) (upholding decision to "place[] primary weight on rates of systems subject to effective competition in fashioning the benchmark approach" as consistent with "a strong Congressional intent that cable subscribers should pay rates consistent with a level of rates that would prevail if their systems were subject to effective competition.").

[28/] *Further Notice* ¶ 14. The *Further Notice* also asks whether the UCB could be used if no other systems that a particular operator owned were subject to effective competition. As noted previously, virtually all cable operators throughout the United States are subject to effective competition in some of their markets, so this should not be an issue. If, however, it were to become an issue, a cable operator could justify its rates using one of the alternative methods described in the next section.

basic tier rate. The exact number of channels today does not dictate basic service rates in competitive markets. Consequently, rather than focusing on the number of basic tier channels, the Commission need only require that the sampled systems contain the statutorily-prescribed mix of basic service tier channels that regulated systems are required to offer on the basic tier.[29/]

Layering overly detailed evidentiary burdens onto the UCB approach also is unnecessary to ensure that it provides a reliable comparative measure of competitive basic tier rates and would largely undermine its principal benefit: administrative simplicity. The UCB eliminates the need for complicated and burdensome forms. In those areas in which an LFA is certified to rate regulate, the cable operator would simply submit to the LFA the rates of the sampled systems on which its UCB is based.[30/] If the UCB rate is equal to or greater than the rate the operator proposes to charge in the regulated system, that rate would be presumed to be reasonable, unless an LFA can show that the cable operator either: (a) incorrectly calculated its UCB; or (b) relied on a distorted sampling that artificially and materially inflated the applicable UCB.[31/] An adverse ruling by an LFA regarding an operator's UCB could be appealed to the Commission (using the same timelines as in the current rules). Filing an appeal would automatically stay the LFA's decision, with refunds plus interest due if the Commission ultimately affirms that the operator's rate exceeds a properly calculated UCB.

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[29/] All rate-regulated cable systems are required by statute to include certain channels in its basic tier. 47 U.S.C. § 543(b)(7).

[30/] A cable operator using the UCB methodology to justify its basic service tier rate would be expected to rely on an objective sampling approach that includes reasonably representative competitive systems.

[31/] To minimize regulatory battles and administrative burdens, local rates that vary from the UCB by a *de minimis* amount should be deemed reasonable. Likewise, because operators may implement basic rate increases at different times of the year, an operator should be allowed to delay its UCB showing for up to 12 months, provided that the operator remains liable for any refunds during this extended filing period.

## III. Regulated Cable Operators Also Should Have The Option Of Justifying Their Basic Service Rates Using Simplified Versions Of The Existing Form 1240.

The Commission adopted the current Form 1240 methodology in order to give a cable operator the means to justify its regulated basic service rate on an annual basis. While the Form 1240 methodology worked satisfactorily for a number of years, its use has become increasingly problematic because it requires the operator to provide myriad details about a system's past and projected basic tier rate "segments" (including, among other things, inflation, programming costs, other external costs, and channel movement, addition, and deletion adjustments). Fortunately, the Form 1240 methodology could be greatly simplified and made available as an alternative to the UCB methodology for systems that currently are subject to rate regulation, as well as for "newly regulated" systems (*i.e.*, systems regulated for the first time or re-regulated after a period of deregulation) without sacrificing the protections it affords consumers.

Under the simplified Form 1240 option, the calculation of the initial basic service tier MPR of a newly regulated system would start with the presumption that the unregulated rate in effect prior to the LFA filing a petition for certification (or re-certification) was set based on competitive market conditions (or was otherwise acceptable to the LFA) and therefore inherently "reasonable."[32/] That prior rate should be used as the starting point (Line A1) of a streamlined calculation that, consistent with the instructions for setting an initial CPST rate using Form 1240, would *not* require the operator to complete most of the form's "segment" calculations such as the CAPs method segment, markup method segment, headend upgrade segment, channel movement and deletion segments, and residual segment.[33/] Instead, the operator would simply have to

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32/ This approach is based on how Form 1240 was once used on a streamlined basis to justify an initial regulated CPST rate in certain circumstances. While that particular circumstance can no longer arise because of the 1999 repeal of CPST regulation, the streamlined approach described in the instructions can and should be adapted to apply to the establishment of the initial basic service tier MPR for newly regulated systems.

33/ The *Further Notice* singles out the irrationality of including a "channel movement" segment in a cable operator's Form 1240 rate calculation given Congress's deregulation of cable programming service tier rates in 1999. *Further Notice* ¶ 29. While none of the listed segments are necessary, NCTA agrees that the channel movement

update the starting rate to account for changes in inflation and external (primarily programming) costs.[34/]

Adoption of this alternative, simplified Form 1240 approach would provide a solution to the thorny issue of how a newly regulated cable system is supposed to establish its initial MPR.[35/] Cable operators would no longer have to concern themselves with the possibility that, in order to establish their initial basic service MPR, they would be expected to identify data going back a quarter century that is no longer readily available and of dubious relevancy (other than the outsized role assigned to it under the current rate regulations).[36/] Indeed, the Commission could eliminate multiple forms used to set rates under the original benchmark methodology, including: Form 1200 (and its predecessor, Form 393), Form 1210 (the largely abandoned "quarterly adjustment" alternative to the Form 1240), and Form 1235 (the "network upgrade" form), and the provisions of its rules directly related to those forms.[37/]

Adapting the Form 1240 for use on a streamlined basis to establish the initial MPR of a newly regulated service is consistent with the public interest, and not just because it allows

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rules are particularly outdated and can produce absurd results. They should be eliminated even if the Commission otherwise decides to retain some of the other Form 1240 segment calculations. Similarly, the Commission should eliminate the confusing provisions of its rules relating to the calculation of a "residual" adjustment that can illogically lead to asymmetric rate adjustments when regulated channels (even the very same regulated channels) are added to or deleted from a system's line-up. Rather, rates should be adjusted based on any changes in programming costs for the programming on the channel, but not for changes in the number of channels.

34/ The Commission should assume that any basic rate charged by a cable operator more than 90 days prior to an LFA filing a certification to regulate the operator's rates was a reasonable rate and allow a newly certified or re-certified LFA to examine only the increase taken from that rate (and order refunds only back to the date of certification). This approach would provide the operator with some degree of rate certainty, while providing the LFA with ample time to respond to a potentially problematic basic service rate increase.

35/ The *Further Notice* specifically raises this issue, seeking comment on whether and how it should replace "the initial rate setting methodology, which requires using data from as far back as 1992, with one based on current, actual BST rates." *Further Notice* ¶ 20.

36/ The Commission acknowledged over 15 years ago that "as time passes…it becomes increasingly likely that the data necessary for this calculation will be unavailable." *2002 Rate Revisions NPRM*, ¶ 27.

37/ The Commission also should eliminate several other "inactive" forms: Form 1211, Form 1215, Form 1225, Form 329 and the rules associated with those forms as well as various rules identified in the *Further Notice* as having been rendered obsolete by the sunset of CPST rate regulation, such as Sections 76.922(e)(2)(iii)(C), 76.980, 76.982, 76.984, and 76.963. *See Further Notice* ¶¶ 34-40.

newly regulated cable operators, LFAs, and the Commission to set rates without having to deal with a multitude of outdated forms and rules. There also is compelling logic in allowing such operators to rely on their pre-regulation rate as the starting point in setting the system's initial MPR. The Commission has already found that cable operators face effective competition nearly everywhere in the country and has established a presumption on that basis. It makes good sense to presume that the basic rates charged in those markets (like all other competitive markets) are reasonable.

The simplified Form 1240 methodology should also be available to a system that, having already established its initial basic service MPR, proposes prospective increases in that rate. A system setting its going forward rate should no longer have to submit a panoply of arcane Form 1240 rate segments for LFA review.[38/] Rather than continue to burden the rate regulation process with these complexities, the rate filing and review for a previously regulated system should be limited to updating the inflation and external costs information submitted with its prior Form 1240 filing.[39/]

Again, allowing use of this simplified Form 1240 methodology would greatly reduce the administrative burdens associated with setting regulated rates. LFAs would no longer need detailed back-up on rates and channel line-up changes made years or even decades earlier (often by a prior system owners). And eliminating separate segment calculations (for all but inflation and external costs) would cut the size of the form and its instructions by more than half. The opportunities for disputes to arise between cable operators and LFAs would also be reduced.

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38/ Those segments include the CAPs method segment, markup method segment, headend upgrade segment, channel movement and deletion segments, and residual segment.

39/ Assuming the Commission adopts the two primary rate justification methodologies NCTA recommends in these Comments, NCTA would support the Commission eliminating, in addition to the benchmark regulations and forms already referenced, the detailed regulations associated with formal cost-of-service filings. NCTA believes that the Commission could eliminate Forms 1220 and 1230 and the regulations associated with those forms, so long as it makes clear that cable operators may always petition for special relief if circumstances warrant and make an appropriate showing under Section 76.7 of the Commission's rules.

Thus, the benefits of such simplification would accrue not only to consumers, cable operators and LFAs, but also to the Commission.

## IV. The Commission Should Update Its Equipment Rate Rules.

The Commission should also update its rules governing equipment rates.[40/] The current Form 1205 approach to equipment rate regulation is unnecessarily burdensome, frequently unworkable, and the source of unresolvable disputes between cable operators and LFAs. We therefore welcome the *Further Notice*'s interest in exploring ways to reform the Commission's existing equipment rate rules, both by redefining which equipment rates are subject to regulation and by simplifying the methodology for justifying equipment rates.

First, the Commission should limit the scope of equipment regulation to the rates paid by basic-only subscribers (whether or not that same equipment also is available at unregulated rates by other subscribers).[41/] The current overly expansive view of equipment rate regulation – which subjects cable equipment to rate regulation for all customers, even those who receive unregulated levels of service – is a relic of a different time. It arose when both basic *and* cable programming service tiers were subject to rate regulation.[42/] But circumstances have decidedly changed, and because nothing in Section 623 requires continuation of this outdated approach, it can and should be rethought.[43/]

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40/ The Commission's rules address the maximum permitted rate that a cable operator can charge for customer premises equipment (such as converters and remotes) and for installation of such equipment. For the purposes of these comments, unless otherwise stated, references to the Commission's "equipment" rules will encompass the rules and forms governing the rates for customer services equipment and installation.

41/ *Further Notice* ¶ 17.

42/ The most significant change since the Commission first addressed the scope of equipment rate regulation is, of course, the deregulation by Congress of cable programming service tier rates effective March 31, 1999. 47 U.S.C. § 543(c)(4). This action in and of itself effectively undermined the rationale for the Commission's original broad approach. Aligning equipment rate regulation with the equipment used by basic-only cable customers will significantly ease burdens on operators and regulators while still providing protection for those customers in the few areas where rates remain regulated.

43/ To be sure, the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) upheld the Commission's initial rules governing the scope of equipment rate regulation. But it did so based simply on the Commission "having offered a permissible interpretation of the statute," not because a narrower

Second, the Commission should allow operators to justify the equipment rates charged basic-only subscribers using a comparative rate justification approach similar to the UCB methodology described above. The same logic supporting the adoption of the UCB approach as a means of justifying basic-service tier rates supports its adoption in the context of equipment rates. Operators should be permitted to rely on the equipment rates they charge in competitive markets to demonstrate the reasonableness of the rates they charge in regulated communities. This approach will reduce the regulatory burdens associated with the Form 1205 while protecting basic-only subscribers from non-competitive rates.[44/]

Third, operators should continue to have the option of using Form 1205 to justify regulated basic-only subscriber equipment rates. However, in order to address the issues that currently make the Form 1205 all but unworkable for many operators, the Commission, at the very least, must clarify that LFAs should evaluate Form 1205 filings based only on the operator's current (*i.e.*, most recent fiscal year) costs, without regard to whether particular categories of equipment and installation-related expenses were previously "unbundled."[45/] A quarter century after the Commission required cable operators to separate their 1992 equipment-related costs from their service rates as part of the initial application of the benchmark methodology, cable operators can no longer readily establish whether various elements of their current equipment-related expenses were part of that unbundling, particularly if the current operator was not the owner of the system at the time of the original unbundling calculation or if the operator has changed its accounting methods over the intervening decades.

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interpretation would have been unreasonable. *Id.* at 178. Nothing suggests that this interpretation, which is not supported by "anything remotely close to dispositive" in the legislative history, *id*., is frozen in time.

44/ Application of the UCB concept to equipment rate regulation also would be consistent with Congress's express preference for competition over regulation.

45/ NCTA would support efforts to further simplify the cumbersome Form 1205.

## V. The Commission Should Adopt Its Tentative Conclusion That Commercial Services Are Not Subject to Rate Regulation.

In addition to seeking comment on revisions to the Commission's basic tier and equipment rate regulation rules, the *Further Notice* addresses a related issue that has been pending before the Commission since the earliest days of rate regulation – the regulatory status of commercial rates. The *Further Notice* tentatively finds that "Congress did not intend to include cable service offered to commercial subscribers within the scope of rate regulation."[46/] NCTA agrees with this sensible interpretation of the 1992 Cable Act. Indeed, NCTA on several occasions has demonstrated why this is the correct interpretation of Section 623,[47/] showing that nothing in the Act or its legislative history evinces any interest in regulating cable operators' charges to commercial customers. Nor is there any policy reason to regulate rates charged to commercial establishments, which have customized services and unique needs different from residential customers.[48/]

## CONCLUSION

NCTA applauds the Commission for initiating this proceeding to update cable rate regulation in a sensible fashion. Given today's intensely competitive video marketplace, the Commission should proceed expeditiously to streamline its existing rate regulations and forms to reflect the realities of the current marketplace, minimize administrative burdens, and facilitate the ability of cable operators to establish regulated basic service and equipment rates that mirror the rates established in competitive communities.

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46/ *Further Notice* ¶ 19.

47/ Comments of NCTA, MB Docket No 02-144, 15-17 (filed Nov. 4, 2002); Comments of NCTA on the Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 15-17 (filed June 29, 1994).

48/ While NCTA supports the Commission's determination that commercial rates are not subject to regulation, we are concerned that the Commission's proposed definitional distinction between residential and commercial customers fails to properly limit the appropriate scope of rate regulation. The Commission should, instead, define residential service potentially subject to rate regulation based on the Census definition of "occupied housing units/households" – just as it does now for measuring "effective competition." *See Further Notice* at ¶ 19.

Respectfully submitted,

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February 8, 2019